STATE OF MICHIGAN

COURT OF APPEALS

ROSETTA WESTFALL and EDWARD WESTFALL, Plaintiffs/Cross Appellees-Appellants, v DALE R. MCCRIRIE, DO, and HILLSDALE SURGICAL GROUP, PLC, Defendants/Cross Appellants-Appellees.	UNPUBLISHED March 30, 2006 No. 265386 Hillsdale Circuit Court LC No. 05-000146-NH

Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

In this medical malpractice case, plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(7).[1] Defendants cross-appeal the trial court's determination that their response to plaintiffs' notice of intent (NOI) failed to comply with MCL 600.2912b(7). We affirm.

This case arose after defendant Dale R. McCririe, D.O., performed bilateral breast reduction surgery on plaintiff Rosetta Westfall on November 4, 2002. Plaintiff and her husband,

[1] On the record at the hearing on defendant's motion for summary disposition, the trial court indicated that it was granting the motion under MCR 2.116(C)(7) and (8). Summary disposition based on MCR 2.116(C)(8) was improper because in granting defendants' motion, the trial court considered documentary evidence, specifically plaintiffs' notice of intent and defendants' response to plaintiff's notice of intent. Since a notice of intent and response to such notice are not included in the definition of a "pleading" in MCR 2.110(A), it would not have been appropriate for the trial court to consider those documents in granting summary disposition under MCR 2.116(C)(8). MCR 2.116(G)(5). However, the trial court is permitted to consider documentary evidence in deciding a motion for summary disposition under MCR 2.116(C)(7). *Id.* Therefore, we will review whether the trial court properly granted summary disposition under MCR 2.116(C)(7).

Edward Westfall, allege that plaintiff suffered severe post-surgical complications and that because of those complications, plaintiff was forced to undergo a double mastectomy on December 16, 2002. MCL 600.2912b(1) provides that a person filing a medical malpractice claim must provide "written notice" to the health-care provider 182 days before an action is commenced. On September 28, 2004, plaintiffs submitted to defendants a NOI as required by MCL 600.2912b(1). On February 28, 2005, 153 days after plaintiffs submitted their NOI, defendants submitted a "written response" as required by MCL 600.2912b(7). Thereafter, on March 3, 2005, plaintiffs filed a medical malpractice complaint against defendants. Plaintiffs' complaint was filed 156 days after plaintiffs submitted their NOI.

Defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10). Defendants argued that because they filed their response to plaintiffs' NOI within 154 days after receiving the NOI, plaintiffs were not authorized to avail themselves of the shortened 154-day notice period provided for in MCL 600.2912b(8). According to defendants, plaintiffs were required by MCL 600.2912b to wait 182 days after submitting their NOI to file their complaint. Defendants further argued that strict compliance with MCL 600.2912b is required and that plaintiffs' premature filing of their complaint was not sufficient to toll the statute of limitations. Therefore, defendants contended that plaintiffs' lawsuit should be dismissed because the statute of limitations had expired. Plaintiffs argued that because defendants' response failed to comply with MCL 600.2912b(7), the 154-day notice period in MCL 600.2912b(8) applied, rather than the 182-day notice provision contained in MCL 600.2912b(1). According to plaintiffs, the filing of their complaint 156 days after they filed their NOI complied with MCL 600.2912b and was not premature and therefore did not warrant granting summary disposition in defendants' favor.

The trial court agreed with plaintiffs that defendants' response failed to comply with MCL 600.2912b(7)(a), (b), (c), and (d). Nevertheless, the trial court ruled that defendants' noncompliance with MCL 600.2912b(7) did not relieve plaintiffs of their obligation to wait 182 days before filing suit as required by MCL 600.2912b(1). Therefore, the trial court granted defendants' motion for summary disposition and dismissed plaintiffs' suit against defendants because plaintiffs failed to comply with MCL 600.2912b and the statute of limitations had run. In reaching this conclusion, the trial court relied, in part, on our Supreme Court's decision in *Burton v Reed City Hosp Corp*, 471 Mich 745, 747; 691 NW2d 424 (2005), in which the Supreme Court held that MCL 600.2912b(1) unambiguously provides that a person "shall not" commence a medical malpractice action until the expiration of the statutory notice period and that a complaint filed before the statutory notice period violates MCL 600.2912b and is ineffective to toll the limitations period. The trial court also relied on this Court's decision in *Saffian v Simmons*, 267 Mich App 297, 299; 704 NW2d 722 (2005), in which we held that the defendant in a dental malpractice case was not relieved of his obligation to respond to the plaintiff's complaint even though the plaintiff's complaint was deficient in that the affidavit of merit that accompanied the complaint was determined in a later judicial proceeding not to be in compliance with MCL 600.2912d(1).

This Court reviews de novo a trial court's decision to grant or deny summary disposition. *Mouradian v Goldberg*, 256 Mich App 566, 570; 664 NW2d 805 (2003). Summary disposition is appropriate under MCR 2.116(C)(7) when a claim is time-barred. *Id.* at 571. In deciding a motion made under MCR 2.116(C)(7), a court should consider all affidavits, pleadings, and other documentary evidence submitted by the parties. *Holmes v Michigan Capital Medical Ctr*, 242

Mich App 703, 706; 620 NW2d 319 (2000). If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred. *Id.* This case also involves questions of statutory interpretation, which this Court also reviews de novo. *Burton*, *supra* at 751.

Plaintiffs argue that the trial court erred in granting summary disposition in favor of defendants. According to plaintiffs, because defendants' response to plaintiffs' NOI did not comply with MCL 600.2912b(7), plaintiffs were permitted to avail themselves of the shortened 154-day notice provision in MCL 600.2912b(8). Based on the language of MCL 600.2912b and our Supreme Court's requirement of strict compliance with the provisions of MCL 600.2912b in *Burton*, we disagree.

MCL 600.2912b(1) provides that a medical malpractice plaintiff is precluded from commencing suit against a health professional or health facility unless the plaintiff provides "written notice" to the health professional or health facility before the action is commenced. The "written notice," or NOI, must specify the factual and legal basis for the plaintiff's claim. MCL 600.2912b(4). After providing the NOI, the plaintiff must generally wait 182 days before commencing a medical malpractice action. MCL 600.2912b(1).[2] The burden of complying with the NOI requirements in MCL 600.2912b is on the plaintiff. *Roberts v Mecosta Co General Hosp*, 466 Mich 57, 59; 642 NW2d 663 (2002). After receiving the NOI from the plaintiff, the defendant must provide a "written response" within 154 days. MCL 600.2912b(7). If the plaintiff does not receive a "written response" within the 154-day period, the plaintiff may commence suit upon expiration of the 154-day period. MCL 600.2912b(8).

Even though defendants filed their response within 154 days after receiving plaintiffs' NOI, plaintiffs did not wait for 182 days after providing their NOI to file their complaint against defendants, as required by MCL 600.2912b(1). Instead, plaintiffs filed their complaint against defendants 156 days after providing their NOI to defendants. According to plaintiffs, they were relieved of their obligation to wait 182 days to file their complaint because defendants' response to their NOI failed to comply with MCL 600.2912b(7), thus triggering the shortened 154-day notice provision in MCL 600.2912b(8) and eliminating the 182-day notice provision of MCL 600.2912b(1). Resolution of this issue requires this Court to construe MCL 600.2912b to ascertain whether the Legislature intended to authorize a plaintiff in a medical malpractice case to unilaterally determine that a defendant's response failed to comply with MCL 600.2912b(7) so as to relieve the plaintiff of the obligation to wait 182 days after filing the NOI before filing the complaint.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). The best measure of intent is the words used by the Legislature. *Mayor of Lansing v Pub Service Comm*,

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[2] MCL 600.2912b(1) specifically provides that "a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced."

470 Mich 154, 164; 680 NW2d 840 (2004). When the language of the statute is not ambiguous, this Court must presume that the Legislature intended the meaning that it clearly expressed, and no further judicial construction is required or permitted; the statute must be enforced as written. *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). A court may not speculate as to the probable intent of the Legislature beyond the language used in the statute. *Cherry Growers, Inc v Agricultural Marketing & Bargaining Bd*, 240 Mich App 153, 173; 610 NW2d 613 (2000).

In MCL 600.2912b, the Legislature provided three exceptions to the statute's requirement that a medical malpractice plaintiff must wait 182 days after providing the NOI before filing the complaint. The exception that is relevant to this appeal is MCL 600.2912b(8), which permits a plaintiff to file the complaint after 154 days if the plaintiff does not receive the defendant's response within the 154-day time period. Specifically, MCL 600.2912b(8) provides: "If the claimant does not receive the written response required under subsection (7) within the required 154-day time period, the claimant may commence an action alleging medical malpractice upon the expiration of the 154-day period."

Plaintiffs, who filed their complaint against defendants 156 days after providing defendants with the NOI, argue that the shortened notice period contained in MCL 600.2912b(8) applies in this case. However, plaintiffs did receive defendants' written response within the 154-day time period. The language of MCL 600.2912b(8) does not permit a plaintiff to unilaterally determine whether a defendant's response satisfies the detailed requirements of MCL 600.2912b(7). Furthermore, MCL 600.2912b does not authorize a plaintiff to ignore the 182-day notice requirement in MCL 600.2912b(1) if the defendant's response does not comply with MCL 600.2912b(7). The Legislature could have specifically authorized a plaintiff to make a determination regarding whether a defendant's response complied with MCL 600.2912b(7). However, it did not do so. If the Legislature had intended to allow medical malpractice plaintiffs to unilaterally determine whether a defendant's response failed to comply with MCL 600.2912b(7) so as to relieve plaintiffs of the obligation to wait 182 days after submitting their NOI before filing a complaint, it would have expressly provided such authority in MCL 600.2912b. Nothing in the language of MCL 600.2912b indicates that the Legislature intended to grant plaintiffs the authority to unilaterally make such a determination. When the language of a statute is not ambiguous, a statute must be enforced as written. *Pohutski*, *supra* at 683. A court may not speculate as to the probable intent of the Legislature beyond the language used in the statute. *Cherry Growers, Inc*, *supra* at 173. Furthermore, in construing a statute, this Court should assume that an omission in the statute was intentional. *People v Wilson*, 257 Mich App 337, 345; 668 NW2d 371 (2003), vacated in part on other grounds 469 Mich 1018 (2004). Because the Legislature did not specifically authorize a medical malpractice plaintiff to unilaterally determine whether a medical malpractice defendant's response complied with MCL 600.2912b(7) as to relieve the plaintiff of his obligation to wait 182 days after filing the NOI before filing the complaint, we presume that the Legislature's omission of such language was intentional and refused to expand MCL 600.2912b(8) beyond the language used in the statute. Irrespective of whether defendants' response satisfied the detailed requirements of MCL 600.2912b(7), plaintiffs received defendants' response within 154 days after providing defendants with their NOI. Therefore, the shortened notice period contained in MCL 600.2912b(8) does not apply.

Because plaintiffs filed their medical malpractice complaint against defendants before the 182-day notice period expired, plaintiffs failed to comply with MCL 600.2912b. In *Burton*, our Supreme Court stated: "The filing of a complaint before the expiration of the statutorily mandated notice period is no more effective to commence a lawsuit than the filing of a complaint without the required affidavit of merit. In each instance, the failure to comply with the statutory requirement renders the complaint insufficient to commence the action." *Burton, supra* at 754. Therefore, our Supreme Court concluded: "A complaint filed before the expiration of the notice period violates MCL 600.2912b and is ineffective to toll the limitations period." *Id.* at 747. Plaintiffs contend that *Burton* is distinguishable from the instant case because the plaintiff in *Burton* filed the complaint only 115 days after providing the NOI, because the defendant's response under MCL 600.2912b(7) was not at issue in *Burton*, and because *Burton* did not address the constitutional issues presented in the instant case. Plaintiffs' attempts to distinguish *Burton* are unpersuasive. In *Burton*, the issue was "whether a complaint alleging medical malpractice that is filed before the expiration of the notice period provided by MCL 600.2912b tolls the period of limitations." *Id.* Although there are additional issues in the instant case, the effect of plaintiffs' premature filing of their complaint is also at issue in this case, and our Supreme Court ruled on this precise issue in *Burton*. Therefore, not only is *Burton* on point with the instant case, but this Court is compelled by stare decisis to follow *Burton* and require strict compliance with MCL 600.2912b. *Topps-Toeller, Inc v Lansing*, 47 Mich App 720, 729; 209 NW2d 843 (1973).

Plaintiffs' contention that the trial court erred in relying on this Court's decision in *Saffian* is also unpersuasive. To the contrary, this Court's opinion in *Saffian* supports the conclusion that plaintiffs were not authorized to unilaterally determine that the failure of defendants' response to comply with MCL 600.2912b(7)(a)-(d) relieved them of their obligation to wait for 182 days after providing their NOI before filing their complaint. In *Saffian*, we held that the defendant had a duty to respond to the plaintiff's complaint notwithstanding the fact that there was a subsequent judicial determination that the affidavit of merit that accompanied the complaint did not comply with MCL 600.2912d(1). *Saffian, supra* at 299. The plaintiff filed a complaint, which was accompanied by an affidavit of merit. *Id.* The defendant failed to file an answer to the plaintiff's complaint, and the plaintiff filed a default. *Id.* Later, the trial court conducted an evidentiary hearing and determined that the affidavit was deficient. *Id.* This Court affirmed the default against defendant, holding that the deficiency in the affidavit did not relieve the defendant of his duty to timely respond to the plaintiff's complaint. *Id.* In so holding, this Court observed that the plaintiff filed an affidavit of merit and that the affidavit of merit was "presumably valid." *Id.* at 306. In making its ruling, the trial court reasoned:

> To hold that a duty to answer the complaint never arose in this case would open the floodgates to all manner of retrospective claims that a defendant had no obligation to respond to a summons and complaint. Such reasoning would undermine the fundamental purpose of default and the finality of judgments. It rewards dilatory response to lawsuits in circumstances in which a lawsuit is, by all initial accounts, valid.
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> Worse, to rule as defendant urges would create the opportunity for defendant to knowingly foster the running of the limitations period by ignoring a lawsuit and then simply bypass the default by attacking the affidavit of merit,

> depriving plaintiff of the legitimate opportunity to cure a defect if attacked in an answer or affirmative defense. A defendant would suffer no adverse consequences if a postdefault attack on the affidavit were successful. In the meantime, a plaintiff's claim is laid to rest as the limitation period expires. [*Id.* at 307.]

Judge Zahra, writing separately, further explained that a defendant is not relieved of the duty to timely answer a plaintiff's complaint even if the complaint was filed with a defective affidavit of merit based on principles of statutory construction. According to Judge Zahra, the defendant was not authorized by statute to "unilaterally determine whether plaintiff's affidavit of merit satisfies the detailed requirements of MCL 600.2012d." *Id.* at 312 (Zahra, J., concurring in part and dissenting in part). Judge Zahra further explained: "Had the Legislature intended to allow medical malpractice defendants to unilaterally determine whether an affidavit of merit failed to comply with the provisions of MCL 600.2912d so as to relieve the defendant of the obligation to file an answer or other responsive pleading, it would have expressly granted such authority." *Id.* at 313 (Zahra, J., concurring in part and dissenting in part).

Like the deficiency in the affidavit in *Saffian* did not relieve the defendant of his duty to file an answer, so the deficiency in defendants' response in the instant case did not relieve plaintiffs of their duty to wait 182 days after providing their NOI before filing their medical malpractice complaint. In the instant case, defendants did not wholly fail to file a response. Defendants did, in fact, file a response, and on its face the response did not appear to be grossly nonconforming; therefore, like the affidavit in *Saffian*, the response was presumptively valid. See *id.* at 306. The Legislature could have expressly granted a plaintiff the authority to unilaterally determine whether a defendant's response failed to comply with the provisions of MCL 600.2912b(7) so as to relieve the plaintiff of the obligation to wait 182 days, but it did not do so. Based on the reasoning of *Saffian* and the rules of statutory construction, the trial court properly ruled that plaintiffs were not authorized to unilaterally determine that defendants' deficient response relieved plaintiffs of their obligation to comply with the statutory notice period of MCL 600.2912b(1).

In sum, this Court is constrained to follow *Burton*'s holding that "[a] complaint filed before the expiration of the notice period violates MCL 600.2912b and is ineffective to toll the limitations period." *Burton*, *supra* at 747. Furthermore, the principles of statutory construction and our holding in *Saffian* also support the conclusion that plaintiffs were not authorized to unilaterally determine that defendants' response to plaintiffs' NOI was deficient so as to relieve plaintiffs of their duty to wait 182 days before filing their complaint against defendants. Therefore, because the parties do not dispute that the statute of limitations has run, we hold that the trial court did not err in granting defendants' motion for summary disposition under MCR 2.116(C)(7).

Plaintiffs next argue that the trial court erred in ruling that defendants had no obligation to submit a separate response to plaintiff husband to respond to his derivative claim for damages. According to plaintiffs, plaintiff husband was a "claimant" under MCL 600.2912b(7) and was therefore entitled to receive a response to plaintiffs' notice of intent to sue. The trial court did not specifically rule on the issue whether plaintiff husband was a "claimant" under MCL 600.2912b(7). This Court does not ordinarily render advisory opinions. *People v Wilcox*, 183 Mich App 616, 620; 456 NW2d 421 (1990). Therefore, we decline to address this issue on

appeal. However, we observe that even if plaintiff husband is a "claimant" entitled to a response under MCL 600.2912b(7), the statute does not contain language requiring a *separate* response for each claimant. Furthermore, MCL 600.2912b(7) permits a defendant to furnish notice "to the claimant or his or her authorized representative." In this case, defendants furnished a single response by fax to counsel for plaintiffs. Because plaintiff husband and plaintiff wife shared the same counsel, defendants' single response to plaintiffs' "authorized representative" satisfies MCL 600.2912b(7).

Plaintiffs next argue that the trial court erred in granting defendants' motion for summary disposition because absent a showing that plaintiffs' premature filing of their complaint prejudiced defendants, MCL 600.2912b violates plaintiffs' due process rights and deprives them of equal protection of the law. In *Neal v Oakwood Hosp Corp*, 226 Mich App 701; 575 NW2d 68 (1997), this Court rejected similar constitutional challenges to MCL 600.2912b(1). Based on our holding in *Neal*, we conclude that plaintiffs' constitutional challenges to MCL 600.2912b are without merit.

In *Neal*, this Court addressed the constitutionality of MCL 600.2912b(1) and held that MCL 600.2912b(1) does not violates the constitutional guarantee of equal protection of the law. The plaintiff in *Neal* alleged that MCL 600.2912b(1) violated equal protection because it treats medical malpractice plaintiffs differently than other tort plaintiffs. *Id.* at 716. This Court determined that MCL 600.2912b(1) constitutes "social or economic legislation that is . . . entitled to deference." *Id.* at 718. Therefore, this Court determined that it would review the statute under the rational basis test:

> Under the rational basis test, legislation is presumed to be constitutional and the party challenging the statute has the burden of proving that the legislation is arbitrary and thus irrational. A statute does not violate equal protection under the rational basis test if it furthers a legitimate governmental interest and the challenged classification is rationally related to achieving that interest. A rational basis exists when the legislation is supported by any state of facts either known or that could reasonably be assumed. [*Id.* at 719 (citations omitted).]

In holding that MCL 600.2912b(1) does not violate the constitutional guarantee of equal protection, this Court observed:

> [MCL 600.2912b(1)] was enacted for the purpose of promoting settlement without the need for formal litigation and reducing the cost of medical malpractice litigation while still providing compensation for meritorious medical malpractice claims that might otherwise be precluded from recovery because of litigation costs. "The state unquestionably has a legitimate interest in securing adequate and affordable health care for its residents." The means sought by the Legislature, i.e., a relatively short notice period before the commencement of suit during which time informal discovery can occur, is rationally related to the Legislature's objective because it is reasonable to assume that claims informally resolved or settled without resort to formal litigation will help reduce the cost of formal medical malpractice litigation. . . . [A] classification that has a rational basis is not invalid because it results in some inequity, and the wisdom, need, or appropriateness of the legislation is irrelevant. [*Id.* at 719-720 (citation omitted).]

In the instant case, plaintiffs argue that MCL 600.2912b violates equal protection because it treats medical malpractice plaintiffs differently from medical malpractice defendants. This Court's reasoning in *Neal* in concluding that MCL 600.2912b(1) did not violate the constitutional guarantee of equal protection is equally applicable to the facts of this case and, for all the reasons articulated by this Court in *Neal*, MCL 600.2912b(1) furthers the legitimate governmental interest of promoting settlement and reducing the costs of medical malpractice litigation and ultimately helping to secure adequate and affordable health care for Michigan's residents. Furthermore, the 182-day notice period is rationally related to the Legislature's objective of reducing the cost of formal medical malpractice litigation. Therefore, MCL 600.2912b(1) did not violate the guarantee of equal protection as applied to plaintiffs.

In *Neal*, this Court also held that MCL 600.2912b(1) did not violate due process because, for the same reasons it articulated in its equal protection analysis, the statute bore a reasonable relation to a permissible governmental objective. *Id.* At 720-721. Therefore, in light of *Neal*, plaintiff's due process argument also must fail.

Plaintiffs also suggest that MCL 600.2912b is unconstitutional in the absence of a showing that defendants were prejudiced by plaintiff's premature filing of their complaint. In *Neal*, this Court specifically rejected the notion that dismissal of a medical malpractice complaint for the plaintiff's failure to comply with MCL 600.2912b(1) is only proper if the defendant suffered prejudice:

> [T]he purpose of the notice requirement contained in § 2912b(1) is not to prevent prejudice to a potential defendant, but rather is to encourage settlement without the need for formal litigation. . . . [W]ere we to hold that a plaintiff's noncompliance with § 2912b(1) requires dismissal only if the noncompliance prejudices the defendant, we would be supplying a judicial gloss contrary to the clear statutory language mandating that "a person *shall not commence* an action alleging medical malpractice . . . unless the person has given . . . written notice . . . not less than 182 days before the action is commenced." [*Id.* at 715 (citations omitted).]

Plaintiffs finally argue that this Court, in deciding *Neal*, failed to consider the rule of law that statutes that limit access to the courts are not looked upon with favor. In fact, this Court in *Neal* specifically rejected the notion that MCL 600.2912b(1) effectively divests medical malpractice plaintiffs of access to the courts, stating: "§ 2912b(1) does not bar medical malpractice plaintiffs from access to the court system, but merely provides a brief temporal restriction before suit may be commenced." *Id.* at 718.

In light of our holding that plaintiffs were not relieved of their statutory obligation to wait 182 days after filing their NOI to file their complaint against defendants even if defendants' response to the NOI was deficient under MCL 600.2912b(7), we need not address defendants' argument on cross-appeal.

Affirmed.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald